

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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DHSC, LLC, D/B/A AFFINITY	:	Case Nos. 08-CA-090083
MEDICAL CENTER	:	08-CA-090193
	:	08-CA-093035
<i>and</i>	:	08-CA-095833
	:	
NATIONAL NURSES	:	
ORGANIZING COMMITTEE	:	
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RESPONDENT’S MOTION FOR RECONSIDERATION

Pursuant to Section 102.48(d)(1) of the Rules and Regulations of the National Labor Relations Board (hereafter, the “Board”), DHSC, LLC d/b/a Affinity Medical Center (hereafter, “Affinity” or the “Hospital”) hereby moves, by and through the Undersigned Counsel, for reconsideration of the Decision and Order (hereafter, the “Decision”) issued by the Board in the above-captioned cases on April 30, 2015.

In large measure, through the Decision, the Board simply adopts the rulings, findings and conclusions of the Administrative Law Judge (hereafter, the “Judge”). As to some issues, however, the Board set forth a view of its own. Additionally, the Board imposed remedies that were not awarded by the Judge. The Hospital addresses these points below, but also wishes to stress that, by seeking reconsideration as to these points, the Hospital does not intend to waive or restrict the objections that have

previously been presented to the Board as part of the parties' previous submissions.

1.) The Board's Grounds for the Rejection of Affinity's Third Affirmative Defense Are Erroneous and the Board's Threat of Disciplinary Proceedings Lacked Any Basis Whatsoever

On grounds different from those on which the Judge relied, the Board rejected Affinity's affirmative defense that the Hospital and the Union agreed to arbitrate the allegations prosecuted by the Acting General Counsel. Specifically, the Board relied upon the fact that the Hospital and the Union are not parties to any collective bargaining agreement and their relationship has not been long or productive. See Decision, page 1, fn. 3. Whether or not the parties' agreement should be characterized as a "collective bargaining agreement" is beside the point. The issue is whether the parties had *an* agreement to arbitrate the disputes, and as explained to the Board as part of Affinity's Exceptions, the Judge prevented the Hospital from offering evidence to prove the existence of the agreement. The Judge's rulings were erroneous and the Board's adoption of the Judge's rulings is no less erroneous. The Board's observation that deferral will "generally" be inappropriate in the absence of a long and productive relationship is also an improper basis to reject the Hospital's defense. If given the opportunity, the Hospital would be able to demonstrate, through testimony and documentary

evidence, that the parties had an agreed-upon dispute resolution system that the parties had invoked on numerous occasions to resolve their previous disputes. The Hospital's evidence, therefore, would show that, so far as the parties' dispute resolution system was concerned, the parties' relationship was productive. Accordingly, lest the Hospital's due process rights be violated, the Board may not rely upon any characterization of the parties' relationship as a basis to reject the Hospital's defense so long as the Hospital has not been afforded an opportunity to present evidence that is probative of the parties' relationship. Accordingly, the Board should remand the proceedings to the Judge so that the Hospital may be afforded an opportunity to present the necessary evidence.

In addition, the Board lacked any basis whatsoever to threaten Affinity and its attorneys with disciplinary proceedings. See Decision, page 1, fn. 3. To begin with, the cases noted by the Board (*e.g.*, Bluefield Regional Medical Center, 361 NLRB No. 154) are separate cases, which involve different employers. The Board has not been presented with even an allegation, let alone made any finding that these hospitals constitute, in effect, one single employer, so that a defense raised by one hospital will be automatically available to any one or more of the other hospitals. In two of the cases referenced by the Decision, as part of denying the Union's request

for litigation expenses, the Board expressly ruled that the given hospital's defense was not frivolous. See Barstow Community Hospital, 361 NLRB No. 34, slip op. at 4 (2014); Fallbrook Hospital, 360 NLRB No. 73 (2014), slip op. at 1, fn. 3. And so, while the Board might prefer to avoid future encounters with what the Board has perceived (mistakenly) as the very same defense, Affinity has every right to an opportunity of its own to assert the defense.

Also missed by the Board is the fact that, anytime the defense would be applicable, but not pursued by Affinity, the Hospital would be vulnerable to an argument by the General Counsel and / or the Union that the Hospital has waived the defense. The Board's view of the defense raised by Affinity, not to mention the defenses raised by these other employers, has not been adopted or approved by any federal court. So long as that is the case, Affinity has every need, and the Hospital's attorneys have every obligation, to continue to raise the defense as part of any future cases before the agency.

In summary, upon reconsideration, the Board should remand the proceedings to the Judge so that Affinity may prove the existence of the parties' agreement to arbitrate the disputes now before the Board, along with the efficacy of the parties' dispute resolution system. Furthermore, as explained above, the Board's threat of possible disciplinary proceedings

lacks any basis whatsoever and ought to be retracted by the issuance of an amended Decision.

2.) The Board Erred by the *Sua Sponte* Imposition of Further Remedies

In the Decision, beyond the remedies awarded by the Judge, the Board ordered that Affinity reimburse Ms. Wayt for the reasonable expenses that she incurred in connection with Affinity reporting her to the Ohio Board of Nursing on account of her falsification of medical records and neglect of patient care. See Decision, page 2. The remedy awarded by the Board is unsupported by the agency's precedent. The remedy is also punitive, and therefore, exceeds the Board's authority under the Act. See e.g., Republic Steel Corp. v. NLRB, 311 U.S. 7, 10 (1940). Additionally, the remedy functions as an award of attorneys' fees, which exceeds the Board's authority under the Act. See e.g., Unbelievable, Inc. v. NLRB, 118 F.3d 795 (D.C. Cir. 1997).

The Board also erred by ordering a notice reading. See Decision, page 2. The remedy is not appropriate under the applicable standard and lacks support in terms of the agency's precedent. Like the reimbursement ordered for Ms. Wayt, the notice reading is also punitive and beyond the authority of the Board. Additionally, the Board lacks the authority to select any given person, such as Ms. Boyle, to read the notice and, by empowering

the Union to pick a day and time for the notice reading to take place, the Board has placed an undue burden upon the Hospital's operations and put patient safety at risk.

For all of these reasons, upon reconsideration, the Board should not award these remedies. To the extent the Board continues to believe that these remedies are appropriate, Affinity requests an opportunity, whether as part of an immediate remand of the current proceedings, or as part of any later compliance proceedings, should any such proceedings ever take place, to offer evidence as to how the Union's control of the logistics of the meetings puts patient care at risk.

CONCLUSION

As noted at the outset, and as Affinity reaffirms here, the Motion now before the Board should not be taken or construed as setting forth the entirety of the Hospital's objections to the Decision. Indeed, because the Board has largely adopted the Judge's rulings, findings and conclusions, the Hospital believes the Decision is flawed, from beginning to end, and expressly reserves any and all rights to challenge the Decision before an appropriate federal court based upon the objections that have already been presented to (and now rejected by) the Board. Accordingly, through the Motion now before the Board, Affinity only seeks to add to the Hospital's

preexisting bevy of challenges. In particular, Affinity believes that the alternative rationales used by the Board as part of adopting the Judge's rulings, findings and conclusions are not supported by the record and defective as a matter of law. Similarly, in spite of the fact that the Judge did not award any extraordinary remedy, and no related exceptions were taken by the Acting General Counsel or the Union, the Board opted to chart a course of its own from the standpoint of remedy. Along the way, as explained above, the Board exceeded the agency's power and awarded remedies that are void as a matter of law.

Dated: May 28, 2015
Glastonbury, CT

Respectfully submitted,

/s/ _____

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CERTIFICATE OF SERVICE

The Undersigned, Bryan T. Carmody, being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. § 1746, that the Respondent's Motion for Reconsideration was served on May 28, 2015 upon the following:

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Dated: Glastonbury, CT
May 28, 2015

Respectfully submitted,

/s/ _____

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